SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, PETER POE, and COE PRESS, INC.,
Petitioners,

—v.—

JANE DOE,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

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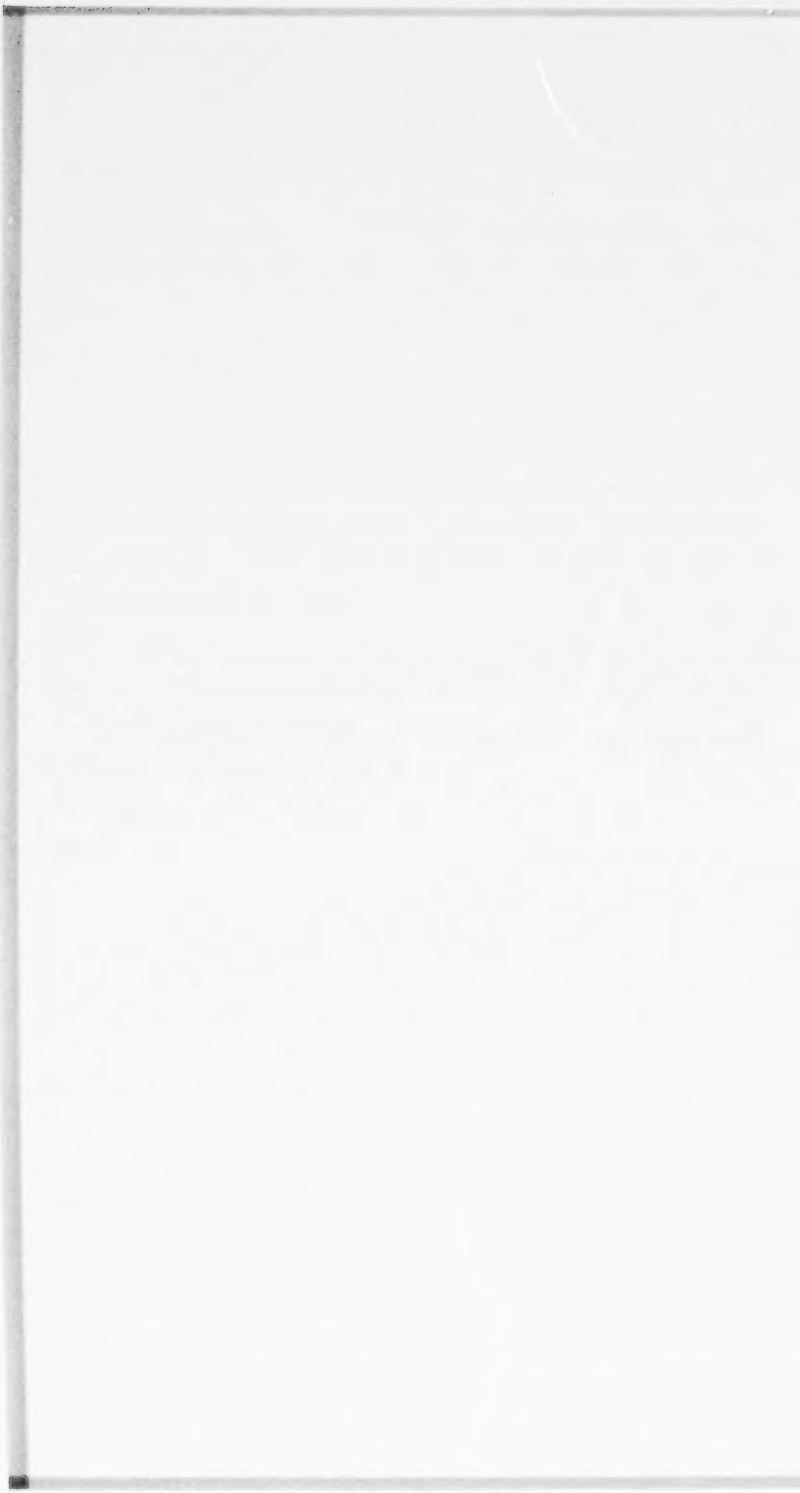

In the

Supreme Court of the United States

October Term, 1973

No. 73-1446

Joan Roe, Peter Poe, and Coe Press, Inc.,

Petitioners,

—v.—

Jane Doe,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

PETITIONERS' REPLY BRIEF

ARGUMENT

POINT I

The record in this case is constitutionally insufficient to support the decision below.

Respondent's brief in this Court attempts to distort the record in this case, perhaps in an effort to divert attention from the glaring constitutional outrage committed by the courts below. The central and undeniable fact presented by this record is that for nearly two years, the New York courts have enjoined the circulation of a book, concededly truthful, scientific, and non-obscene, and presumptively protected by the First Amendment, although not a single one

of those courts has found that *any* individual or societal interest is harmed by the book. The plain reason for this attempted distortion,[1] of course, is that should this Court reach a decision upon the actual record in this case, respondent recognizes that the preliminary injunction cannot possibly be sustained.

The brief *amici curiae* of the American Psychiatric Association, *et al.* (hereinafter "*amici* APA"), although it

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[1] There is *no* support in the record, either in references provided in respondent's brief, or anywhere else, for the following statements:

(a) On pp. 4-5, that, in accordance with respondent's fanciful presumption theory, see *infra*, the factual issue in dispute which must be "assumed" in respondent's favor, is that "a reader of the book who knew about the patient, would have known that the book related to her and her former husband." In fact, the issue as drawn by Special Term (A84), and affirmed by the Appellate Division (A104) was whether the plaintiff could be identified by someone who not only knew the plaintiff but who also knew that plaintiff was the patient of the doctor.

(b) On p. 5, that petitioners claim that Special Term resolved the factual question of *consent* in their favor. In fact, petitioners' brief (p. 5) makes it clear that the factual question decided "largely" in their favor is the question of identifiability.

(c) On p. 5, that both sides agree "that the psychiatrist requested, and the patient refused, to give written consent."

(d) On pp. 26-27, that there is nothing in the record to support the contention that petitioners sought to expedite the proceedings in the state courts. See petitioners' brief, p. 6, n. 4. What respondent objects to is that petitioners insisted on attacking the injunction, in every forum available, and on the most expedited basis available, rather than accommodate respondent's strategy of forcing petitioners to trial with an injunction in force, and without adequate discovery.

(e) On p. 36, that CPLR §4504(a), New York's medical testimonial privilege statute, imposes "sanctions" on physicians, and on p. 41, that petitioners "violated" this statute.

(f) On p. 47, that the Appellate Division "considered the book . . . not a scientific work."

does not indulge in record distortions, is premised almost entirely on a single but fundamental misreading of the proceedings below. See Point I B, *infra*.

A. *There is no "presumption" of New York law which can decontaminate the constitutional errors committed below.*

Thus, respondent's entire argument is based upon a purported "presumption" of the New York Civil Practice Law and Rules, that because the intermediate state appellate court made no explicit factual findings in its order granting leave to appeal to the highest state court, "it must be assumed that all factual disputes were resolved in favor of the [respondent]" (Brief, pp. 3-4). Respondent is clearly and demonstrably wrong in urging that this arcane[2] provision was applied by the Court of Appeals, or that this was a proper case for that court to do so. This Court need not even consider this question of New York law, however, for even if respondent is conceivably correct—which we deny—her argument is not aided, since such a *sub silentio* application of the statute would still leave this Court with no indication whatever on the record of the basis for the actions of the courts below. Either the presumption was not applied, and the Court of Appeals sustained the injunction on the ground of a totally inadequate factual record, in

[2] The Court of Appeals of the State of New York has decided not a single case under this provision since the adoption of the CPLR in 1963. Nor is the Practice Commentary cited in respondent's brief (p. 4, n. 1) of any assistance. Indeed, respondent's brief fails to advise the Court, and without any explanation, or even any indication of omission, that the second quotation, ostensibly taken from the Practice Commentary written on the 1963 statute, is in fact, taken from (and cited to) Cohen & Karger, POWERS OF THE NEW YORK COURT OF APPEALS, published in 1952, commenting on an earlier and different statute.

which the only clear finding is that of Special Term that respondent was not identifiable (A83-84); or it was applied, and the injunction was sustained upon a ground of state law nowhere articulated, or even raised, in the state courts. In either case, this Court is presented with a record upon which it is totally impossible to determine the ground upon which the courts below purported to override the "heavy burden" of presumptive unconstitutionality of prior restraints, and the injunction must be vacated.

Moreover, that no such presumption in fact underlay the decision of the court below appears obvious. First, as respondent's own brief makes clear, the presumption is invoked only where neither the orders of the Appellate Division, nor its opinion, sets forth its disposition of the facts, but that court's order granting leave to appeal (A124-125) states directly that its modification of the *nisi prius* court's order was based solely on a decision of law. Further, the intermediate court's opinion makes equally clear that the trial court's factual findings were affirmed; the opinion specifically states that, except for the broadening of the injunction to enjoin *all* distribution of the book, the "order is affirmed" (A103). The only ground of disagreement with the lower court set forth by the Appellate Division, is its legal conclusion, urged by *both* parties, that it could "find no justification for the distinction attempted to be drawn between 'scientific readers' and the general public" (A104). Thus the findings of fact by the lower court—including its finding that the respondent almost certainly could not be identified by readers of the book—were specifically affirmed,[3] the requirements of CPLR

[3] The contrary assertion by *amici* APA, *et al.*, that Special Term was reversed on the facts, is without merit. See pp. 7-9, *infra*.

5612(b) were satisfied, and no contrary presumption was invoked by the Court of Appeals. Indeed, this conclusion is buttressed by the action of the Court of Appeals itself, in deciding the case at all. The most widely respected treatise upon New York Civil Procedure[4] observes that "The consequence of invoking the presumption is ordinarily dismissal of the appeal." 7 Weinstein, Korn & Miller, NEW YORK CIVIL PRACTICE, §5612.07, at pp. 56-87 to 56-88 (1973).[5]

But the Court of Appeals did not dismiss the appeal, nor did it direct resettlement to clarify any confusion. Rather it decided the case on the merits, although regrettably without opinion. And in neither its original decision (A127) nor its amended decision (A128) is there even a hint that the decision is based on this "presumption" which respondent's counsel now raises for the first time. See 7 Weinstein, Korn & Miller, NEW YORK CIVIL PRACTICE, §5612.05, at pp. 56-85 to 56-86: "[A] presumption must, after all, accord with common sense." So, of course, must its application. Plainly, respondent's contention that this Court must decide the case as if all factual contentions had been decided in her favor, is erroneous, and all of respondent's subsequent arguments (Brief, p. 6, p. 13, p. 14, p. 42), which are based on this erroneous contention, must fail.

Even if respondent is conceivably correct, however, that this case was a proper one for the invocation by the court

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[4] Written by three of the authors of the CPLR.

[5] The sole case offered by respondent in support of her arguments is totally irrelevant. *Chaplin* v. *Selznick*, 293 N.Y. 529, 58 N.E.2d 719 (1944), decided under the predecessor Civil Practice Act, holds only that where "neither Special Term nor the Appellate Division made express findings of fact," the Court of App is would assume all facts in favor of the appellee. Even respondent does not claim that Special Term made no findings (see A82-85).

below of the presumption in her favor, her argument still must fail. First, it is noteworthy that the contention, supposedly dispositive, was not raised in the one proper forum for its invocation, and the one proper forum to authoritatively determine its applicability: the state court charged with applying it in a proper case. Neither respondent's brief in the Court of Appeals, nor her oral argument there, nor even her opposition to petitioners' motion to amend that Court's remittitur,[6] contained so much as a word with regard to this supposedly dispositive argument; indeed, not even her Brief in Opposition to Certiorari in this Court raises the issue. Clearly, respondent cannot now be heard to raise an argument of state law which has been waived in the state courts. See *Milliken* v. *Meyer*, 311 U.S. 457, 461 at n. 8 (1940). Moreover, even if respondent is correct, that the Court of Appeals should have, and did, invoke the presumption, its decision—which affirmed a prior restraint—cannot stand, where it did not articulate this reason for that decision. See petitioners' opening brief, pp. 9-21. If this Court entertains even a suspicion that respondent is correct as to the rationale of the decision below, the injunction should be vacated, and the case remanded to the courts of the State of New York for a determination as to whether this case is a proper one for the invocation of the presumption, and whether, if so, the presumption is dispositive in view of those courts' interpretation of the constitutional issues here presented.

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[6] The crux of respondent's argument in opposition to amending the remittitur was her counsel's view that "the constitutional question raised is not substantial". Affidavit of Ephraim S. London, Esqs., Feb. 14, 1974, p. 3.

B. *The Appellate Division did not reverse Special Term.*

Still more insupportable is the contention of *amici* APA, *et al.*, that the "only reasonable reading" of the Appellate Division's opinion is that the latter court "reviewed the record, and reversed the trial court's ruling on identifiability" (pp. 28-29).[7] This contention is predicated on the sentence:

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[7] *Amici's* assertion that the state courts all resolved the issue of consent in respondent's favor (Brief, p. 28) is equally unwarranted, but matters little. Respondent's consent or lack thereof has no bearing on this action, until it becomes clear that she can be identified. Unless it is shown that there is potential harm to the respondent, the State may not, with or without "consent" by her, tamper with the petitioners' constitutional right to publish. Moreover, even *amici's* assertion (*id.* at n. 26) that the consent claimed by petitioners was obtained during therapy, and is therefore suspect, is undercut by the authorities cited elsewhere in their brief (pp. 40-41, at n. 45). The examples of "consents" which they there set forth (Laing & Estherson, SANITY, MADNESS AND THE FAMILY (1964); Laing, THE DIVIDED SELF (1965)), give no clue as to whether such consent was obtained before, during, or after therapy. Even a cursory review of the literature belies the assertion that "Very few [case histories] are book length expositions concerning a single person or family," and that in such cases, consent might readily be obtained. See, e.g., Deutsch, H., NEUROSES & CHARACTER TYPES (1965) (no mention of consent); Rosenthal, D., ed., THE GENAIN QUADRUPLETS (1963) (no mention of consent); Thigpen, C. and Cleckley, H., THE THREE FACES OF EVE (1957) (no mention of consent); Parker, B., A MINGLED YARN: CHRONICLE OF A TROUBLED FAMILY (1972) (one daughter gave consent for case history of whole family); Lindner, R. M., REBEL WITHOUT A CAUSE (1944) (subject gave consent but others identifiable in case history did not). Besides these book-length case histories not discussing consent, there are many in which consent was obtained, though often it is unclear whether the consent was valid —if *amici's* contentions are correct—because there is no mention of whether it was given before, during or after therapy. Dewald, P. A., THE PSYCHOANALYTIC PROCESS: A CASE ILLUSTRATION (1972); Baruch, D., ONE LITTLE BOY (1952); Milner, M., THE HANDS OF THE LIVING GOD (1969). In the preface to one of Sigmund Freud's book-length case histories, FRAGMENT OF AN

> "The claimed justification for publication, resting on the alleged consent of plaintiff and the attempt to disguise her identity, does not provide a sufficient valid basis for denying the [preliminary injunction]" (A104).

To begin with, it is mind-boggling to argue that where both an opinion (A103) and an order (A108) recite *affirmance*, except for a specified modification, and there is not even a word about reversal, this must somehow be regarded as a reversal. *Amici's* argument, moreover, completely ignores the statement, appearing in no less than *three* dispositions issued by the Appellate Division,* that its decision was made as a matter of law. Even in the absence of such statements, an equally reasonable reading of the sentence in question, is that it takes no position on the facts, but simply holds, as a matter of law, that the defenses raised by the petitioners, even if true, are insufficient.

Indeed, the *amici* themselves concede that "this ruling is less specific than might be desired" (Brief at p. 29), and this concession alone is fatal to their contentions, for this Court's decisions make manifest that only a clear, specific finding as to the relevant facts could possibly overcome

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Analysis of a Case of Hysteria, Freud explicitly states that he neither asked for nor obtained consent. VII The Complete Works of Sigmund Freud (Standard (Hogarth) 1935 ed.), at 7. A footnote later added to this preface states that, in his remaining book-length case histories, he obtained consent, but makes no mention of when it was obtained. *Id.* at 14. Analysis of a Phobia in a Five-Year-Old Boy; Notes Upon a Case of Obsessional Neurosis; Psychoanalytic Notes on an Autobiographical Account of a Case of Paranoia; From the History of an Infantile Neurosis.

* Opinion, at A103; Order, at A107; and Order Granting Leave to Appeal, at A125.

the heavy burden of presumptive unconstitutionality borne by a prior restraint. See petitioners' opening brief, pp. 9-20. While the courts may occasionally relax their standards of clarity and precision in reviewing the findings of such lay persons as Selective Service local board members, see, e.g., *United States* v. *Andrews*, 466 F.2d 1086, 1088 (10th Cir. 1971) ("... [B]oards of volunteer laymen cannot be expected to make court-like findings of fact."), courts, at least, can indeed be expected to make court-like findings. This Court can, and must, demand more of judges trained in the law, before permitting to stand a decision affecting such basic, fundamental rights as the right to publish under the First Amendment.

C. *The legal basis of the decisions below is nowhere articulated in the record.*

Not only have the courts below failed to set forth any factual basis for their actions, but they have failed to identify in any way the legal basis for the injunction here under review, and for this reason, too, the decision below must be vacated.

The opinions of the courts below which troubled to write opinions at all are so vague as to their legal bases that the *amici curiae* APA *et al.* are able to identify no fewer than five possible "potential justifications" for the affirmance of the injunction,[9] but do not appear to endorse any of them enthusiastically. Respondent accepts most of these, and

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[9] "[C]ommon law contract, state licensing statute, common law tort privacy, state privacy statute, and constitutional privacy right . . ." (Brief, p. 23). Because of this proliferation of possible decisional rationale, and the failure of the state courts to articulate any of them—or any other—*amici* are correct in their assertion that the decisions below are "unclear as to the source of respondent's legal protection" (Brief, p. 26).

adds her own.[10] These numerous *post hoc propter hoc* "justifications" demonstrate even more conclusively that the "cryptic and somewhat inconsistent" (*Amici*, p. 10) state court decisions nowhere identify that which the state courts purported to be protecting, and by no means identify any interest of greater magnitude than the First Amendment. Thus, any injunction based on those decisions must unquestionably be vacated. There is plainly no warrant for the *amici's* argument (pp. 18 *et seq.*) that, because it is impossible to determine the legal basis of the decision below, the writ of certiorari should be dismissed (see Point III, *infra*). The very question which is presented to this Court by the petition for a writ of certiorari is whether a state may enjoin the distribution of a book, when its reasons for doing so cannot be divined.[11]

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[10] Respondent somehow seeks to create injunction-generating authority in Civil Practice Law and Rules §4504(a) (Brief, pp. 36-37) which establishes in New York the testimonial privilege which most states provide to doctors in their courts. Aside from the fact that the statute obviously contemplates a situation in which the patient is identified, publicly, and by name, in open court, it is respectfully submitted that a statute regulating civil practice in a state's courts is an odd place, indeed, to look for a provision regulating what books its citizens may write.

[11] Nor is there any warrant for the assertion by *amici* that constitutional analysis will vary greatly, depending upon the various labels which might be attached to respondent's cause of action; this Court has made it abundantly clear that such "mere labels" cannot affect analysis of fundamental constitutional issues. *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419-420 (1971); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964).

POINT II

The injunction constitutes an impermissible prior restraint.

Respondent contends for a definition of the term "prior restraint" which is convenient for her argument, but which is manifestly preposterous. Even if the definition proposed by the respondent is conceivably a correct one, however, it is plain that the proceedings in the courts below have failed to comply with the required standards, and the injunction is improper.

Respondent argues that the sole instance in which a prior restraint is to be found, is in the case of a "curb on communication imposed by law or originated by an agency of the government, where there is no assurance of an adversary court proceeding to test the validity of the restriction before, or immediately after, it is imposed" (Brief, p. 17). This incredible doctrine, obviously, would permit no less than a total, blanket system of pre-publication licensing of every book, magazine, newspaper, film, speech, and recording—a system irreconcilably at odds with the accepted understanding of the system of free expression which has historically prevailed in this country. Plainly, a system allowing blanket restraint of communication, before there has been a full and proper judicial determination of reasons why the material is undeserving of the protections of the First Amendment, is precisely the type of presumptively unconstitutional prior restraint against which this Court has so strenuously guarded over the years—and it is precisely the type of restraint which

has been imposed in this case, despite respondent's efforts to make it appear otherwise.

Even if the respondent is in part correct, and a preliminary injunction against publication of a book could, in some conceivable circumstances, be held proper, the issuance and affirmance of the injunction here under review cannot be found to be correct, because there simply has been no determination of the harm sought to be prevented by the restraint imposed. It is this incontrovertible and ineradicable error in the proceedings below which distinguishes all of the cases cited by respondent, and which belies all of her labored attempts (Brief, pp. 23-28)[12] to demonstrate that the means by which the injunction was issued complied with the requirements of due process and of the First Amendment.

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[12] All of these efforts are for nought, since even a summary evidentiary hearing, theoretically allowable under §2218 of the New York CPLR, is subject to the court's discretion, and not a matter of right; where the factual questions are difficult and complex, the New York courts will be reluctant to grant such a hearing. *Stowell v. Berstyn*, 26 A.D.2d 828, 274 N.Y.S.2d 120 (2nd Dept. 1966). Moreover, because of the extensive factual questions in this case, any such hearing would have been meaningless without adequate pre-hearing discovery. *Amici* concede that full resolution of this case "would obviously have required at least several months" (p. 27). Respondent (pp. 26-27) taxes petitioners' counsel's view that an early trial would not have been feasible because of the vast amount of factual matter which must be unearthed in extensive pre-trial discovery of respondent. Respondent then indulges in non-record and unfair description and characterization of the attempts to complete the deposition of the plaintiff-respondent. It has indeed required parts of six days to complete and the final session was held on December 10, 1974. In petitioners' view the reasons for the delay were the scores of improper objections interposed, and the deliberate efforts on the part of respondent to frustrate petitioners' efforts to obtain a thorough factual account of her claims. It is interesting to note that prior to the outset of respondent's pre-trial examination of petitioner, Dr. Roe, commenced on December 11th, respondent's counsel stated that the examination would take at least several days.

In each of the cases cited by the respondent as approving prior restraints, the courts held the restraints to be justified only because of the demonstrated existence of carefully defined, limited, special circumstances—none of which are shown to be present here—which provided a reason for subordinating the ordinarily imperative commands of the First Amendment. Thus, in those cases involving the disclosure of information asserted in some way to be "secret" or "confidential," the identity of the injured party was either absolutely clear,[13] or need not have been specifically disclosed in order to cause the injury.[14] Similarly irrelevant are such picketing cases as *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), in which it had been clearly established that the picketing in question was closely bound up with extensive union violence, and *Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490 (1949), in which it had similarly been clearly established that the picketing was being conducted by truck owner-operators in furtherance of an illegal antitrust conspiracy.

The obscenity cases offered by respondent likewise do not advance her argument. In both *Paris Adult Theatre I*

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[13] *Commonwealth* v. *Wiseman*, 356 Mass. 251, 249 N.E.2d 610 (1969), *cert. den.* 398 U.S. 960 (1970) (films of patients); *Clayman* v. *Bernstein*, 38 Pa. D & C 543 (1940) (photographs of patient's face); *Blumenthal* v. *Picture Classics, Inc.*, 235 App. Div. 570, 257 N.Y.S. 800 (1st Dept. 1932), *aff'd* 261 N.Y. 504, 185 N.E. 713 (1933) (film of plaintiff); *Feency* v. *Young*, 191 App. Div. 501, 181 N.Y.S. 481 (1st Dept. 1920) (same). *Blumenthal* and *Feency*, moreover, were decided decades before this Court made clear the application of First Amendment protection to motion pictures, in *Burstyn* v. *Wilson*, 343 U.S. 495 (1952), and contain not a word of discussion of constitutional issues.

[14] *Kewanee Oil Co.* v. *Bicron Corp.*, —— U.S. ——, 42 U.S.L.W. 4631 (1974) (trade secret); *United States* v. *Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. den.* 409 U.S. 1063 (1972) (national security).

v. *Slaton,* 413 U.S. 49 (1973), and *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957), there had been a *final* determination in the courts below, after *full* trial of the issues, that the works in question were obscene and therefore beyond First Amendment protection. Most egregiously distorted is respondent's description of *Kingsley,* that it " . . . involved a statute that authorized the issuance of a preliminary injunction (and a permanent injunction after trial) . . . . The Court held that the statutory scheme was not an unconstitutional prior restraint . . . " (Brief, p. 20). Contrary to respondent's implications, however, a reading of *Kingsley* makes clear that all that was before this Court, and all this Court passed upon, was the final injunction issued after full trial on the merits, which had led to a final judgment that the material was obscene.[15]

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[15] It is for this reason, of course, that petitioners referred to *Kingsley* as an "irrelevant" obscenity case, a statement which appears so to perplex respondent (Brief, p. 22). By thus misconstruing petitioners' argument, respondent reaches the ridiculous conclusion that under it "all one need do is make that accusation [of obscenity] against the book", for a constitutionally permissible injunction to issue. There is, of course, no warrant for such an argument, although the reason respondent makes it is plain—she indeed has been required to do little more than make the accusation that the book identifies her, in order to obtain the injunction. Nevertheless, respondent continues to make accusations and insinuations of obscenity and pandering (pp. 7, 8, 10, 22, 23), in addition to totally improper attacks on the scientific content of the book (pp. 10, 23 at n. 1). It is therefore interesting to note that *amici,* on the contrary, characterize the book as "scientific speech" (p. 39). Moreover, Dr. Alan A. Stone, Professor of Law and Psychiatry at Harvard University, who assisted in the preparation of the brief for *amici* (see p. 47), in a letter to petitioner Dr. Roe which explained his support of the *amicus* brief, and set forth his view that the book should not be distributed "against the wishes of your patient", even if Dr. Roe prevailed in the legal proceedings, observed that the book "is a moving document and a serious document . . . . It is not cheap sensationalism, nor pretentious jargon. It is in the tradition of humanistic psychology with which I deeply empathize" (Letter dated August 22, 1974).

This Court has recently observed that "The special vice of a prior restraint is that the communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 390 (1973). Mr. Justice Powell's statement precisely describes what has occurred in this case. Even if this Court should hold, as a matter of federal constitutional law, that a state may prevent the publication of a medical case history in which the patient's identity is inadequately disguised,[16] there is simply nothing in this record which demonstrates that the state courts found the patient here to be inadequately disguised, or, indeed, to indicate any reason for them to have issued the injunction.

It is this fact also which contradicts respondent's lengthy attempt to show that the procedures employed below accorded enough due process that the injunction must be held to be valid. See note 12, *supra.* Respondent's argument here in fact reduces almost to the circular one that, *because* the courts below issued and affirmed the injunction, they must be *presumed* to have acted properly. Petitioners' entire argument, however, is that the courts below, as the record clearly demonstrates, have failed to place any serious burden on the respondent, of showing a high degree of likelihood that she can be identified in the book—a violation of the requirements of state law, which was argued in the courts below, and a violation of constitutional law, which was argued both in the courts below, and in this Court.

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[16] For an argument that no such cause of action should be recognized, inasmuch as the medical profession can be expected to develop its own ethical codes, see "Legal Protection of the Confidential Nature of the Physician-Patient Relationship", 52 COLUM. L. REV. 384, 398 (1952). See also "Medical Practice and the Right to Privacy", 43 MINN. L. REV. 943, 961-962 (1959).

Nor, of course, is respondent correct in taxing petitioners with failure to seek a testimonial hearing (Brief, pp. 24, 25). If there were questions of fact not resolvable upon the written affidavits before the court, then, as a matter of both state law and of constitutional law, the injunction should not have issued. In addition, as this Court has often held, it is totally improper to place the burden of going forward upon the party seeking to publish; if a testimonial hearing was required to resolve disputed questions of fact, it should have been sought by the one seeking to ban the book. See *Blount* v. *Rizzi,* 400 U.S. 410, 417-418 (1971); *Freedman* v. *Maryland,* 380 U.S. 51, 58 (1965).

In sum, even if this Court should accept the respondent's notions as to what is required before the enjoining of a book may be permitted, even that patently inadequate standard has not been met, and the proceedings in the courts below do not remotely approximate even the most minimal constitutional requirements which must be met before a state may abridge the rights guaranteed by the First Amendment.

POINT III

This case presents a final decision, ripe for review by this Court, and certiorari was properly granted.

Respondent urges upon this Court the contention that certain of the questions discussed in petitioners' opening brief, principally the constitutional standards which must be met before a state may establish a cause of action which affects First Amendment rights, are not properly before this Court (Brief, pp. 12-15). The *amici* make a related argument, that the record is not sufficiently developed for

this Court to reach a decision upon all of the far-reaching issues presented by this case, involving the resolution of the conflicting claims of medical science and the First Amendment on one hand, and patients' rights to privacy or confidentiality on the other (Brief, pp. 18-27).

In part, petitioners are in agreement with these arguments. The courts below have required the respondent to make almost no showing at all to justify the grant of the injunction in this case, particularly if her incredible argument (Brief, p. 36, n. 1) is accepted, that she need not even have shown she is identified, in order to have a cause of action. This Court need not resolve any significant issue of necessary standards of disguse, in order to vacate a restraint on publication where the restraint is expressly posited upon no countervailing interest whatsoever. Even the most avid advocate of the "balancing test" in First Amendment analysis must have *something* to put in the balance opposite the right of free expression.[17]

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[17] It is nevertheless surprising to find that *amici*, three professional associations of psychiatrists and persons in related fields, who "have a keen interest in the advancement of scientific learning through the publication of case studies" and who cherish the "ability to propagate ideas through publication" (p. 4), express a truncated view of the extent of their own First Amendment rights. On page 39 *amici* contend that not only the case history involved in this case, but "scientific speech" in general, is entitled to less First Amendment protection than other categories of expression, specifically speech which criticizes government and public officials. While such a parsimonious view of the First Amendment has received some limited advocacy, see Bork, "Neutral Principles and Some First Amendment Problems", 47 IND. L.J. 1 (1971), petitioners are not aware of any decision by this Court which has supported a second-class status for scientific speech. On the contrary, this Court has held, "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government." *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967). Moreover, in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 147 (1967), this Court affirmed that it

Only if this Court is able to detect some standard applied by the courts below in justifying the enjoining of petitioners' book, need it reach the further issues presented by this case—but if this Court is indeed able to detect the standard, then it is faced squarely with the question of whether that standard meets the requirements of the First Amendment. The injunction plainly cannot be permitted to stand unless it so complies. While petitioners believe that the injunction can only be found valid if it rests upon a cause of action for reckless failure to disguise the patient,[18] this Court need reach that issue only if it finds

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was the intent of the constitutional founders "that a free press would advance truth, science, morality and the arts in general, as well as responsible government." Accord: *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1939) (". . . all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period."); see Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment", 79 HARV. L. REV. 1, 13 (1965) ("Education and all its phases, the achievements of philosophy and the sciences, literature and the arts, all fall within the subjects of 'governing importance' that the First Amendment absolutely protects from abridgement"); see also Hastie, "Free Speech—Contrasting Constitutional Concepts and Their Consequences", 9 HARV. CIV. RTS.-CIV. LIBS. L. REV. 428, 434, 435 (1974).

[18] This is the standard applied in an analogous context involving a clash between a privacy claim and the First Amendment, in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). See petitioners' opening brief, pp. 32-35. Respondent's brief strains mightily (pp. 47-51) to distinguish *Time* from this case, on various grounds, including the elements of newsworthiness and falsity, both present in *Time*. These arguments were virtually anticipated in an analysis of *Time* by a respected scholar in this field: "Although the *Time* decision is expressly limited to cases involving fictionalized reports or articles about newsworthy persons, there can be little doubt that its logic would extend *a fortiori* to cases involving true accounts. If the First Amendment protects fictionalized accounts of private lives absent malice, why would it not protect true accounts?" Bloustein, "Privacy, Tort Law, and the Constitution", 46 TEX. L.R. 611, 622 (1969). And in a much cited article written before *Time*, the late Prof. Harry Kalven suggested that "liability for

that the record below clearly establishes a failure by the petitioners to disguise the patient.[19]

It is for this reason that *amici* are clearly erroneous in asserting that certiorari should be dismissed. Whatever facts might be established after a full trial—and whatever facts might have been developed by the courts below, had they taken more care with these sensitive issues—the record of this case now presents clearly a decision by the courts of the State of New York, final in that it is otherwise unreviewable, that with no showing of harm at all, an injunction could issue against further distribution of a book protected by the First Amendment. No further proceedings, and no further development of the facts, and no more extensive or careful reflection upon trial, will have any effect at all upon this incredible decision, and this Court must vacate the injunction to remedy, to whatever extent remains possible, the intolerable damage already done to the one most basic and indispensable constitutional liberty.

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disclosing a truth about the plaintiff would at most be actionable only if the defendant published with bad motives." Kalven, "Privacy in Tort Law", 31 LAW & CONTEMP. PROB. 326, 335 (1966).

[19] *Amici* suggest a standard of "no reasonable likelihood that the subject can be identified" (p. 30), but without any reasoned critique of petitioners' proposed standard of "reckless failure to disguise", or its genesis in *Time, Inc.* v. *Hill, supra,* and without any authority in support of such a proposal. Compare "Medical Practice and the Right to Privacy", 43 MINN. L. REV. 943, 948-949 (1959). Respondent, on the other hand, posit an extreme standard of absolute liability, even where there is "innocent failure to disguise sufficiently" (p. 51), and incredibly, even where there is no disclosure of identity (p. 36). Thoughtful comments on the subject, in both legal and medical journals, have recognized that no standard would be satisfactory which did not allow for publication of properly disguised case histories. See "Extrajudicial Truthful Disclosure of Medical Confidences: A Physician's Civil Liability," 44 DEN. L.J. 463, 464 (1967); Hollender, "Privileged Communications and Confidentiality", 26 DISEASES OF THE NERVOUS SYSTEM 170, 173 (1965).

In 1905, Dr. Sigmund Freud exhibited remarkable prescience concerning the dilemma of the physician who is publishing a case history:

> "[I]n my opinion the physician has taken upon himself duties not only towards the individual patient but towards science as well; and his duties towards science mean ultimately nothing else than his duties towards the many other patients who are suffering or will someday suffer from the same disorder. Thus it becomes the physician's duty to publish what he believes he knows of the causes and structure of hysteria, and it becomes a disgraceful piece of cowardice on his part to neglect doing so, so long as he can avoid causing direct personal injury to the single patient concerned. I think I have taken every precaution to prevent my patient from suffering any such injury." VII The Complete Works of Sigmund Freud (Standard (Hogarth) 1953 ed.), at 8-9.

Notwithstanding all of Dr. Freud's precautions, and even if they were approved as sufficient by the unanimous professional judgment of his colleagues, under respondent's view, the book would be enjoined, and the physician would be liable in damages, if the patient could establish that she was identifiable, and under the view of *amici*, if a court should simply hold that Dr. Freud's precautions were insufficient. The doctor's dilemma has not fundamentally changed in seventy years. While this case cannot completely resolve the dilemma, affirmance of the injunction will terribly exacerbate it, but reversal will substantially relieve it, and at the same time vindicate First Amendment principles, not only for the doctor who publishes, but for the people who read.

CONCLUSION

For all of the reasons set forth herein, and in petitioners' opening brief, the decision below must be reversed, and the injunction must be vacated.

Dated: New York, New York
December 13, 1974

Respectfully submitted,

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